

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NIKOLA DEDVUKOVIC,

Defendant-Appellant.

UNPUBLISHED

September 16, 1997

No. 167974

Recorder's Court

LC No. 93-002406

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529; MSA 28.797, and one count of unarmed robbery, MCL 750.530; MSA 28.798. Defendant was sentenced to concurrent terms of ten to twenty years' imprisonment for the armed robbery convictions and one to fifteen years' imprisonment for the unarmed robbery conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of an incident in which defendant and a companion, while one of them was armed with a stick or bat, robbed the owner and three patrons of a bar.

Defendant contends that there was insufficient evidence presented at trial to support his convictions of armed robbery. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996). The elements of armed robbery are (1) an assault, (2) a felonious taking of property, and (3) the defendant must be armed with a weapon described in the armed robbery statute. *Id.*

In this case, the testimony of the three patrons, viewed in a light most favorable to the prosecution, provided sufficient evidence from which the jury could have concluded beyond a reasonable doubt that defendant himself committed two armed robberies with a stick or bat. It is true that the owner gave conflicting testimony, particularly her testimony that it was defendant's companion who wielded the stick or bat. However, the conflicting testimony simply created issues of fact and

credibility to be resolved by the trier of fact. We will not overturn defendant's

convictions on the basis of the credibility of the witnesses. *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996). Moreover, contrary to defendant's assertion, a rational jury could infer that defendant took money from Rose Molnar's control from evidence that he assaulted her and knocked her unconscious, robbed other patrons, and that she later discovered that money was missing from her purse. The fact that Molnar was unconscious at the time of the taking is of no consequence because her purse was within her control and she could have retained possession of her property if not for defendant's violence. *People v Clark*, 113 Mich App 477, 480; 317 NW2d 664 (1982).

Next, defendant raises a jury instruction issue with respect to the "armed" element of armed robbery. We note that after the jury began its deliberations it sent out a note asking "Is a fist considered a weapon in armed robbery?" In response, the trial court reinstructed the jury with the elements of armed robbery pursuant to CJI2d 18.1, including the element that "at the time of the assault the defendant was armed with any object capable of causing death or serious injury that the defendant used as a weapon." See CJI2d 18.1(3)(b). Defendant now argues that this instruction was error because it clearly confused the jury by implying that a fist could be "any object capable of causing death or serious injury that the defendant used as a weapon."

The decision to provide additional instructions at the request of the jury, as well as the extent of the instructions, is a matter within the trial court's discretion. MCR 6.414(F); *People v Fisher*, 166 Mich App 699, 714; 420 NW2d 858 (1988)¹; *People v Perry*, 114 Mich App 462, 467; 319 NW2d 559 (1982). This Court reviews jury instructions in their entirety, and even if somewhat imperfect, reversal is not required if the instructions presented the issues to be tried and sufficiently protected the defendant's rights. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996).

To support a conviction for armed robbery, a defendant must in fact be armed with something, i.e., "an article which is in fact a dangerous weapon—a gun, knife, bludgeon, etc., or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon." *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). Thus, we assume, without deciding, that defendant correctly contends that a fist, by itself, is not a dangerous weapon for the purpose of armed robbery. See *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993).

In this case, the trial court's use of CJI2d 18.1(3)(b) to reinstruct the jury correctly stated the law. We are not persuaded by defendant's argument that this instruction clearly implied that an "object," understood in a common sense manner, could be a "fist." We also note that before the jury began its deliberations, the trial court instructed the jury with CJI2d 18.1(3)(a), specifically stating that the jury had to find "that at the time of the assault the defendant was armed with a weapon designed to be dangerous and capable of causing death or serious injury, i.e., a stick, or bat." Viewed in their entirety, we conclude that the instructions concerning the "armed" element of armed robbery presented the issues to be tried and sufficiently protected defendant's rights. Moreover, the jury was also instructed on aiding and abetting and the evidence was overwhelming that either defendant or his companion was armed with a stick or bat. Because we find no instructional error requiring reversal, we further conclude that the trial court did not abuse its discretion in denying defendant's motion for a new

trial on this ground. *People v Torres (On Remand)*, 222 Mich App 411, 415; ___ NW2d ___ (1997).

Next, defendant argues that the trial court abused its discretion in refusing to allow the jury to review trial testimony during deliberations. We decline to address this issue on the ground that defendant failed to object to, and therefore preserve, this issue. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995).

Finally, defendant contends that he was denied the effective assistance of counsel by numerous errors allegedly made by trial counsel throughout the course of her representation of defendant. Defendant preserved this issue by moving for a new trial on this ground below following this Court's remand to permit defendant to do so. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Following an evidentiary hearing, the trial court denied defendant's motion.

To find that a defendant's right to effective assistance of counsel was so undermined as to justify a reversal of his conviction, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the defendant was so prejudiced by the representation that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). With respect to the consideration of prejudice, the defendant must show that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

This Court reviews the trial court's decision on a motion for a new trial for an abuse of discretion. *Torres, supra*. In order to determine whether the trial court abused its discretion, this Court determines whether the reasons given by the trial court in support of its decision were legally recognized reasons and whether these reasons are supported by any reasonable interpretation of the record. *People v Leonard*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 178121, 186776, issued 7/18/97), slip op p 5; *People v Bart (On Remand)*, 220 Mich App 1, 11, n 3; 558 NW2d 449 (1996). Where the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion. *Leonard, supra*.

We have reviewed the record with respect to each of the errors allegedly committed by counsel. We conclude that in denying defendant's motion for a new trial based on this ground, the trial court's reasons were legally recognized and supported by a reasonable interpretation of the record. Accordingly, we find no abuse of discretion.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage

¹ Remanded on another ground, 176 Mich App 316 (1989), remanded yet again on another ground, 190 Mich App 598 (1991), reversed on another ground, 442 Mich 560 (1993).